

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	.	Criminal No. 1:04cr385
	.	
vs.	.	Alexandria, Virginia
	.	June 11, 2020
ALI AL-TIMIMI,	.	2:09 p.m.
	.	
Defendant.	.	
	.	
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES: (by telephone)

FOR THE GOVERNMENT:	JOHN T. GIBBS, AUSA GORDON D. KROMBERG, AUSA DANIEL T. YOUNG, AUSA United States Attorney's Office 2100 Jamieson Avenue Alexandria, VA 22314
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FOR THE DEFENDANT:	THOMAS M. HUFF, ESQ. P.O. Box 2248 Leesburg, VA 210177 and JONATHAN TURLEY, ESQ. The George Washington University Law School 2000 H Street, N.W. Washington, D.C. 20052
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OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595
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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 P R O C E E D I N G S

2 THE CLERK: Okay. Criminal -- Civil Action 04 -- oh,
3 I'm sorry, Criminal Case 04-385, United States of America v.
4 Ali Al-Timimi. Would counsel please note their appearances for
5 the record.

6 MR. HUFF: Yes. This is Thomas Huff for the
7 defendant.

8 MR. TURLEY: Yes. This is Jonathan Turley for the
9 defendant.

10 THE COURT: All right. For the government?

11 MR. YOUNG: Daniel Young for the government.

12 MR. KROMBERG: Gordon Kromberg for the government.

13 THE COURT: All right. Who will be the main
14 spokesperson for the defendant?

15 MR. HUFF: With respect to the emergency motion, it
16 will be me, Thomas Huff.

17 THE COURT: All right. And for the government, who's
18 going to be addressing that motion?

19 MR. YOUNG: It will be Daniel Young, me, Your Honor.
20 Thank you.

21 THE COURT: All right. So I don't want to hear from
22 other counsel then. And, Mr. Huff and Mr. Young, whenever you
23 speak, you need to state your name first because this is an
24 on-the-record telephone conference, and we can't tell who you
25 are since we're not looking at you. All right?

1 MR. HUFF: Yes.

2 MR. YOUNG: Yes, Your Honor.

3 THE COURT: And we're having trouble hearing you.

4 Hold on one second.

5 All right. Mr. Huff, speak a little softer. Let me
6 hear you again.

7 MR. HUFF: Okay. Check one, two, three.

8 THE COURT: That's much better.

9 All right. And, Mr. Young, let me hear from you. A
10 little softer.

11 MR. YOUNG: The rain in Spain falls mainly in the
12 plain.

13 THE COURT: You're hard to understand. Are you on a
14 speaker phone, cell phone? What are you on?

15 MR. YOUNG: I'm on a voice over IP connection. I can
16 try calling the line back from a different phone, Your Honor,
17 if I'm not intelligible.

18 THE COURT: Well, you're intelligible, but it's
19 difficult. So I think the phone is a better way to do this,
20 but we'll try.

21 MR. YOUNG: Okay. I will dial in momentarily, Your
22 Honor.

23 THE COURT: All right. We'll wait for you.

24 While we're waiting, Mr. Kromberg, are you there
25 still?

1 THE CLERK: He didn't hear you. I had it on mute.
2 It's off mute now.

3 THE COURT: All right. Mr. Young, are you there?

4 MR. YOUNG: This is Dan Young for the government.

5 THE COURT: All right. That's much better, all
6 right?

7 So now we have Mr. Huff and Mr. Young on the phone.
8 And again, please state your name first. Just say "Huff" or
9 "Young," and then say whatever you're going to say.

10 All right. So this matter is before the Court, and
11 the only matter I'm hearing today is the defendant's emergency
12 motion for release from custody pending appeal. I want
13 Mr. Huff first -- I'm sorry, Mr. Young first. Can you tell me
14 what is your knowledge of the status of any COVID infections at
15 Super Max?

16 MR. YOUNG: Yes. This is Young. The government
17 reached out to our contact at FCC Florence, and that includes
18 all the Florence facilities, among them ADX Florence, where the
19 defendant is housed, and as of this morning, there are no
20 reported cases of COVID-19 among either staff or inmates in the
21 FCC Florence series of facilities.

22 THE COURT: All right. Well, Mr. Huff, that is
23 certainly a factor which the Court has to take into
24 consideration in evaluating your motion, because right now,
25 ironically, your client is actually in a safer environment

1 vis-a-vis the virus than he would be if he was living in the
2 District of Columbia.

3 MR. HUFF: So I acknowledge that, Your Honor, but at
4 the same time, I think the, the *Harris* court dealt with this
5 same situation in D.D.C., also evaluating a section 3145(c)
6 motion in the context of the pandemic, and the *Harris* court
7 observed that while, you know, uncertainty is endemic in the
8 present circumstances, that uncertainty can't preclude courts
9 from acting until the damage is done.

10 I think especially for a person like our client, who
11 has certain underlying health conditions, should he contact --
12 or should he contract COVID-19, it may well be too late,
13 especially because, you know, in this particular prison
14 situation, any sort of medical transfer requires -- at least
15 it's our understanding requires special FBI approval that's not
16 readily granted.

17 THE COURT: All right. And again, I don't quite know
18 why we're getting so much strange background noise on your
19 connection, but we're going to have to put up with it for now.

20 Well, as you know, this is an unusual case because
21 unlike most of the motions for compassionate release, in
22 Mr. Al-Timimi's situation, he has not yet -- his case is on
23 appeal. I haven't had any other cases where the individual was
24 on -- was in custody and there was an appeal pending.

25 And so under 18 U.S.C., Section 3145(c), I've got to

1 find by clear and convincing evidence, number one, that
2 Mr. Timimi does not pose a risk or a danger -- a risk of flight
3 or a danger to the community, and I don't think the government
4 is arguing that that actually would be the case. He was on
5 bond throughout the court proceedings. But for his conviction
6 for the one offense that carries life imprisonment, he would
7 probably have been allowed to self-surrender; and while he was
8 on bond for quite a long time while the proceedings were going
9 on, there were absolutely, to my knowledge, no problems with
10 his fully satisfying all the conditions.

11 So I think the first factor clearly goes in his
12 favor, and I think the government basically doesn't dispute
13 that. It's the second and third factors, that is, whether his
14 appeal raises a substantial question likely to result in
15 reversal, a new trial, or a sentence of time served; and the
16 third factor, that there are exceptional reasons why his
17 detention is no longer appropriate.

18 I think the COVID-19 virus threat plus the underlying
19 health conditions of Mr. Timimi are certainly relevant factors
20 that go into that third consideration. The second factor,
21 though, the second consideration about the appeal is a really
22 fascinating one because even at the time of the trial, I was
23 concerned and voiced some concern about some of the unique
24 legal issues; and, of course, now that has become more
25 complicated in the post-*Johnson-Davis* era, where at least two

1 of the counts of conviction are most likely vulnerable to being
2 set aside.

3 So I really, I guess, want to hear from the
4 government as to why you think this defendant should not be
5 allowed to be released on bond especially given the fact that
6 he's already served well over ten years of incarceration. And
7 were the defense to be successful in, in getting these counts
8 that are still at issue reversed, then it would be a manifest
9 injustice that he would have been serving time for offenses
10 which are no longer valid.

11 So I want to hear the government's response to that.

12 MR. YOUNG: Yes, Your Honor. This is Mr. Young. I
13 would say a few things. At the outset, I think the overarching
14 argument is sort of the one with which we concluded our filing
15 in this case, which is while, of course, Your Honor is correct
16 that this defendant has served a substantial period of
17 incarceration, the government's position throughout this
18 litigation has been that these are extraordinarily serious
19 offenses; and to the extent that there are consecutive
20 sentences with mandatory minimums, I think the government's
21 position would be that that reflects Congress's judgment that
22 somebody who before the first step-back violated 924(c) or was
23 liable for violating 924(c) in this fashion or somebody who is
24 liable for that carrying of explosives, carrying federal
25 felonies in this fashion, aren't to serve that period of

1 incarceration. So that's -- at the highest level of
2 generality, I think that's the government's assertion.

3 With respect to the criteria governing the motion, I
4 suppose I would say that if I'm not focusing my comments in
5 ways that are helpful to the Court, Your Honor, please let me
6 know; but the government has disputed the notion that there are
7 substantial questions at least with respect to the 844
8 explosives counts; and I can just say a few words about those
9 issues.

10 Those counts are sustainable on either an aiding and
11 abetting or a *Pinkerton* theory; and, of course, the government
12 is aware that the Court had some questions at the time of trial
13 about the applicability of those theories; but we don't think
14 that any further developments in the law have undermined the
15 validity of those convictions.

16 I'd start with the *Pinkerton* theory --

17 THE COURT: Well, wait, wait.

18 MR. YOUNG: Of course, the --

19 THE COURT: Wait, sorry. I don't want to hear
20 those -- those motions are not explicitly before the Court, and
21 I don't really want to get into them. I mean, you've discussed
22 them somewhat in your papers on the bond issue, but let me ask
23 you this: I believe now that every other defendant in this
24 multi-defendant case has finished their term of incarceration;
25 and, you know, unlike Kwon and Khan and the others, Mr. Timimi

1 did not go to Pakistan. He never touched a gun or an
2 explosive. And the people who did touch the guns and
3 explosives didn't get sentences anywhere near as draconian as
4 his.

5 And so if you look at the entire case and all the
6 players in the case, it is somewhat disconcerting to think that
7 somebody as removed as he -- even if he were the instigator,
8 the end of the instigation, the final acts of the instigation
9 by other players in the conspiracy did not result in anywhere
10 near as long a sentence as he is now serving.

11 And so I think that certainly is an equity factor
12 that the Court has to have in mind. It goes into the
13 exceptional circumstances factor that we have to look at, and
14 this case has a ton of what I think are complex and difficult
15 legal issues.

16 I know you, you say that there -- the government may
17 win them; and you very well may; but the fact that the
18 government might win the appeal does not necessarily mean that
19 there are not meritorious issues, real, interesting, legal
20 issues that are permeating this case such that in deciding
21 whether or not the defendant ought to be at this point free
22 from incarceration, which has the extra potential burden for
23 him of a significant health problem should he become infected.

24 So I think this is a very unique case, and it's a,
25 it's a troubling one, and so I'm not convinced that there's

1 anything I've seen in your papers, in the government's papers
2 that really undercuts the defendant's argument that at this
3 juncture, this particular motion ought to be granted in his
4 favor.

5 MR. YOUNG: This is Mr. Young. May I say a few words
6 in response, Your Honor, that would be helpful to the Court?

7 THE COURT: Go ahead.

8 MR. YOUNG: The first is the government takes Your
9 Honor's point about codefendants, and, of course, Your Honor
10 recognized the point about instigation, but in the government's
11 view, I do want to underscore during this conference that, you
12 know, this defendant was in a leadership position in a critical
13 moment after the worst terrorist attack on American soil in
14 living memory and used that power and influence to direct
15 others on a course of committing treason against the United
16 States, and while it is true that the defendants who
17 successfully made it to the LeT camps were not able to get to
18 Afghanistan and pick up arms against Americans fighting the
19 Taliban, that could not have been known at the time on
20 September 16, when these events occurred. So I feel it's
21 important to say that, Your Honor, because that is the
22 government's view of the equitable balance of the case, and we
23 think it puts this defendant in a separate category.

24 With respect to danger, I would be remiss, Your
25 Honor, if I did not say the follow-on, which is the Court is

1 entirely correct that the government did not raise the danger
2 issue in its filing. We focused on other issues where we
3 thought our arguments were stronger.

4 I would want to make the Court at least aware, this
5 defendant was not always subject to the special administrative
6 measures about which we informed the Court as an attachment to
7 our filing to speak to whether or not he's at risk of
8 contracting COVID-19 while incarcerated.

9 There was an event that occurred in about 2010 that
10 led to the imposition of those measures; and since the Court
11 does have to make a finding by clear and convincing evidence
12 that he's not a danger, if the Court is leaning towards
13 granting the motion, the government would respectfully request
14 the opportunity to make a production to defense counsel and a
15 filing just so the Court is aware of the circumstances
16 surrounding imposition of those measures because they could be
17 relevant to the Court's fact-finding; and I wanted to inform
18 the Court of that. While it is not something that the
19 government has focused on, if it comes down to that, it might
20 be helpful for the Court to at least have that information.

21 And the last thing that I would say, Your Honor, you
22 know, Your Honor described Mr. Al-Timimi as having serious
23 health conditions.

24 THE COURT: Wait, wait. Stop, stop. Counsel, you've
25 got to stop for a second. Are you rustling papers? What kind

1 of phone are you using right now? We're getting incredible
2 static on it.

3 MR. YOUNG: I am standing stock-still on a cell
4 phone, Your Honor. I'm not rustling papers. I apologize.

5 THE COURT: Well, you've got to get some landlines at
6 the U.S. Attorney's Office if you're going to be doing many of
7 these conferences by phone because it's very difficult. I'm
8 not sure we're going to have a verbatim transcript because
9 you've been very hard to understand.

10 Mr. Huff, have you been able to -- I'm sorry,
11 Mr. Young, have you been able to -- I'm sorry, what are we
12 looking at here?

13 Mr. Huff, have you been able to hear clearly what
14 Mr. Young is saying?

15 MR. HUFF: Yes, I have, Your Honor.

16 THE COURT: All right. Well --

17 MR. HUFF: So I guess one thing I would say, in
18 response to the SAM, it's interesting that the government
19 mentions that because we've been objecting to the imposition of
20 the SAM for at least three years in a row now. I've written an
21 objection letter to the Board of Prisons basically saying I
22 don't understand why the SAM has been imposed, and I've never
23 gotten any response. So it's almost a little bit too little
24 too late here.

25 This is a, you know, a person that has not shown any

1 propensity for violence, no classified information involved
2 that he is privy to. So I, I don't see the justification
3 there.

4 THE COURT: Well, obviously, we don't have it. I
5 mean, the government must believe that they have something; and
6 that would be, I think, appropriate; and it probably should
7 have been in the, in the response in the first place, because a
8 question that I always want answered, and it was on my list to
9 ask the government, was whether or not there had been any
10 disciplinary infractions by Mr. Timimi within the last couple
11 of years that would go to the issue of whether or not he posed
12 any danger to the community; and so obviously, I don't have a
13 complete record on that issue.

14 Well, it's quite difficult to hear you-all; and I
15 think you've, you've briefed the issues well. I've sort of
16 expressed to you my concerns about this case. I want to see
17 what the government's argument is, what the evidence you have
18 as to this issue of possible misbehavior by the defendant.

19 When was he moved? Where was he before, at Marion,
20 before he went to Colorado? Where was he?

21 MR. YOUNG: This is Mr. Young. For a period, he was
22 in the Eastern Neck, and between that time and Colorado, I do
23 not know, and so I would invite, I suppose, either of my
24 colleagues if they do know to respond.

25 MR. HUFF: The one thing that I know -- this is

1 Thomas Huff. The one thing that I'm aware of, I've been on the
2 case since 2014, and it was early 2015 that he was moved to
3 ADX. However, my information is that the SAM order was imposed
4 before that, around 20- (inaudible).

5 THE COURT: All right.

6 MR. KROMBERG: Your Honor, this is Gordon Kromberg.
7 So the SAM, the special administrative measures, were imposed
8 in 2010, when Timimi was still at Northern Neck. There had
9 been a significant amount of time when he was at the Alexandria
10 Detention Center; and then he had been moved to Northern Neck;
11 and an incident arose while he was at Northern Neck which
12 caused the imposition -- triggered the imposition of the SAM.

13 THE COURT: And then did he go from 2010, was he then
14 put in Super Max? How long has he been there?

15 MR. KROMBERG: I can check right now. I think I have
16 that information. Hang on.

17 MR. HUFF: Your Honor, this is Thomas Huff. I'm
18 aware of this because I was working on the case at the time.
19 It was early 2015 that he was moved to ADX.

20 THE COURT: But -- all right. Between 2010, when the
21 SAM was imposed, and the time he gets moved into Super Max,
22 where is he in that five-year interval? I couldn't decipher
23 the one attachment that I thought might have had his different
24 locations. Was he ever at Atlanta?

25 MR. KROMBERG: I do not think so, Judge.

1 THE COURT: Who just spoke?

2 MR. KROMBERG: I believe that is -- I'm looking at
3 something from 2012, when he was still at Northern Neck. I
4 will look at my documents from 2013 and 2014 momentarily.

5 As of 2013, he was still at Northern Neck; and in
6 2014, as of April 1, 2014, he was still at Northern Neck.

7 THE COURT: All right. So it sounds as though he may
8 have gotten -- gone directly from Northern Neck then to ADX.

9 MR. KROMBERG: As of 2015, as of April 2015, he was
10 at U.S. Penitentiary in Hazelton, West Virginia.

11 THE COURT: All right. Okay.

12 MR. KROMBERG: And as I trace this through, I should
13 be able to determine when he got to -- when he got where.

14 THE COURT: Mr. Kromberg, though --

15 MR. KROMBERG: He was still at Hazelton, West
16 Virginia, as of -- my records show he was still at Hazelton,
17 West Virginia, as of March 2016; and as of March 2017, he was
18 at the U.S. Penitentiary in Florence, Colorado.

19 THE COURT: All right. My understanding is that
20 people normally are not moved into Florence, because that is
21 the ultimate holding facility, unless they've had significant
22 problems in other institutions and/or they've been convicted of
23 an offense that, you know, automatically sort of puts them
24 there, like Mr. Moussaoui and the shoe bomber.

25 Is there anything in this record to suggest as to why

1 he didn't go directly to Florence, why there was this delay, if
2 he's such a serious inmate?

3 MR. KROMBERG: Your Honor, this is Mr. Kromberg. I
4 do not have any information on why he was moved to Florence per
5 se, but the information about why the SAMs were imposed might
6 have an effect on what the Bureau of Prisons decided to do --
7 excuse me, the sequence of events including the events of 2010
8 are likely to have had an impact on where he went.

9 THE COURT: All right. Well, I still --

10 MR. TURLEY: Your Honor, this is Jonathan Turley. My
11 cocounsel was not counsel back then, so I just wanted to give
12 the Court the benefit of my recollection. I was counsel
13 through this period.

14 I, I am not sure what Mr. Kromberg is referencing
15 with regard to Northern Neck. My understanding is that
16 Dr. Al-Timimi had an excellent record at Northern Neck.

17 He was then transferred to the interim facility. We
18 were never told why he was transferred, but I was never told by
19 anyone at any time that he was transferred to Colorado because
20 he had had any disciplinary problems or that he was a danger in
21 any regard.

22 THE COURT: All right. Well, I think that would help
23 to inform my decision, so I would like to get that,
24 Mr. Kromberg, as soon as you can, all right?

25 MR. KROMBERG: Yes, ma'am.

1 THE COURT: All right. The other issue while I have
2 you-all on the phone is the defense have raised the issue that
3 some of the classified information that was such a thorn in
4 everybody's side, because as you will recall, Mr. Kromberg, and
5 I think, Mr. Turley, you were on the case at that time as well,
6 that the information was considered so classified that the
7 government would not allow my law clerks to help me with it, so
8 I said, well, until I get a law clerk who can work on it, I'm
9 not touching it, and that's why it went into hold for so long,
10 but you've represented in your papers, Mr. Turley and Mr. Huff,
11 that some of that information has been declassified or the
12 classification is lowered, and so there may be more
13 accessibility to it.

14 MR. KROMBERG: Your Honor, this is Gordon Kromberg.
15 Can I, can I interject for just a moment, I think, to clarify
16 the record?

17 THE COURT: Yeah.

18 MR. KROMBERG: So that the document, the information
19 that was so highly classified has not been disclosed to the
20 defense, but that was the subject of Your Honor's ruling in
21 2014.

22 THE COURT: Right.

23 MR. KROMBERG: The document that is now at issue was,
24 was classified but it wasn't, it wasn't the type of sensitivity
25 that was the -- that your clerk would not be cleared for. The

1 document that's now at issue was provided to your chambers in
2 2007 as a part of one of the government's ex parte filings; and
3 the government has provided a somewhat redacted version of it
4 to the defense, I guess it was earlier this year.

5 So just, just for the purposes of the record, the
6 things that, that held the case up that your clerk could not be
7 cleared for, that is over. This is one particular document the
8 Court has in its file, because I filed it --

9 THE COURT: Right.

10 MR. KROMBERG: -- more than 13 years ago, and the
11 defense has not seen it in unredacted form, but they have seen
12 most of it at this point, Your Honor.

13 THE COURT: Okay. All right.

14 MR. TURLEY: Well, Your Honor -- and this is Jonathan
15 Turley. If I could establish our position on this, the, the
16 document, the Squad IT-3 document is indeed unclassified. Our
17 understanding is that the material that has not been disclosed
18 is being withheld under some type of law enforcement privilege.
19 Mr. Kromberg may be able to clarify that. But I do not believe
20 that that document is classified.

21 We've also asked for discovery on a number of
22 serialized investigations that are mentioned in the IT-3
23 document. These are investigations that are, include 217423
24 and 222852 as well as others. We don't know the status of
25 those -- that information because we've never been given

1 discovery as to those investigations.

2 And also, just to clarify something that Mr. Kromberg
3 said, we have also raised the Ammerman report, which was also
4 raised with the Fourth Circuit. We don't know the status of
5 all the information underlying that, but in both of these
6 incidents, we have raised what we believe are glaring
7 contradictions with what the government has said to the Court
8 in the past as to its own orders, in fact, in contradiction of
9 what the Court has said in the case as to its understanding of
10 any investigations before 2003; but we also have noted that
11 these documents, included Squad IT-3, make direct reference not
12 only to Dr. Al-Timimi but to matters that were involved at
13 trial. They were material matter. So that's the reason we've
14 made these discovery requests.

15 But in this mix, there is clearly unclassified
16 material with regard to Squad IT-3, and then there's the
17 serialized investigation which we are really still in the dark
18 on.

19 THE COURT: All right. Well -- all right. That's
20 not before us right now. We'll take a look at that. I want to
21 try to get this case -- or the things that are on our calendar
22 wrapped up in the not-too-distant future, but the issue that's
23 pending right now is the one about whether the defendant should
24 be released on bond pending appeal, and I want to see what the
25 government has as to any disciplinary infractions that

1 Mr. Timimi may have accumulated in the time he's been in
2 custody and the reasons why a SAM has been imposed and actually
3 what the SAM restrictions are.

4 So, Mr. Kromberg, you need to get that information to
5 the Court and, of course, to defense counsel, all right?

6 MR. KROMBERG: Yes, ma'am.

7 THE COURT: All right. While we are on the phone,
8 because I know it's been hard for my reporter to hear
9 everthing, Anneliese, is there anything that you want any of
10 the counsel to spell out for you? Did you get everything in
11 terms of particularly the numbers and the letters that
12 Mr. Turley was referencing? Did you get all of that?

13 THE COURT REPORTER: Is it Squad IT-3?

14 THE COURT: Squad IT-3? Do we have that correct,
15 Mr. Turley, Squad, S-q-u-a-d?

16 MR. TURLEY: Squad IT-3, yes.

17 THE COURT: IT-3, okay. It's IT, right, as in
18 international --

19 MR. TURLEY: Yes, IT.

20 THE COURT: All right, thank you.

21 Anything further? If not, then we're signing off.
22 Thank you for participating by phone. I think next time, I'm
23 going to make you come to court because this was a little bit
24 difficult.

25 MR. TURLEY: Thank you, Your Honor.

1 THE COURT: All right?

2 MR. YOUNG: Thank you, Your Honor.

3 (Which were all the proceedings
4 had at this time.)

5

6 CERTIFICATE OF THE REPORTER

7 I certify that the foregoing is a correct transcript of
8 the record of proceedings in the above-entitled matter.

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/s/

Anneliese J. Thomson

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